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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1148

RICHARD BLAIR,
Petitioner,

v.

THE CITY OF FARGO, a Municipal Corporation, and
BOARD OF EDUCATION OF THE CITY OF FARGO,
a Body Corporate,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of North Dakota

RICHARD BLAIR
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Grand Forks, North Dakota 58201

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INDEX

	Page
Prayer	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement of the case	3
Reasons for granting the writ	7
Conclusion	15
Appendix A—Opinion of Supreme Court of North Dakota	A-1
Appendix B—Order of Supreme Court of North Dakota	A-12
Appendix C—Order of Supreme Court of North Dakota	A-14

Cases Cited

Marbury v. Madison, 1 Cranch. 137-2 L. Ed 60 (1803) 7

State v. Power, 59 N. W. 1090 (1894) 11, 12, 14

Statutes Cited

Constitution of North Dakota:
- Article 1, Sec. 20 8
- Article 1, Sec. 21 9

Constitution of the United States:
- Fourteenth Amendment 2, 3, 7

The Enabling Act (Chapter 180, U. S. Statutes at Large 676, approved February 22, 1889) 2, 9
28 U. S. C., Sec. 1257 (3) 2
North Dakota Statutes:
Sec. 1229, compiled laws of 1913 (Vol. 1) 13
Sec. 3552, compiled laws of 1913 (Vol. 1) 13
Sec. 3559, compiled laws of 1913 (Vol. 1) 13
Sec. 3560, compiled laws of 1913 (Vol. 1) 13, 14
Sec. 3771, compiled laws of 1913 (Vol. 1) 10
Sec. 3775, compiled laws of 1913 (Vol. 1) 14
40-01-03 North Dakota Century Code (N. D. C. C.) 14
40-02-04 North Dakota Century Code (N. D. C. C.) 10
40-03-01 North Dakota Century Code (N. D. C. C.) 10

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of North Dakota

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Richard Blair, the Petitioner, respectfully prays that a writ of certiorari issue to the Supreme Court of the State of North Dakota to review an order of said Court entered on Nov. 3, 1969 (Civil No. 8546), which denied a petition for rehearing in the case of Richard Blair v. The City of Fargo, a municipal corporation, and Board of Education of The City of Fargo, a body corporate. A copy of the order of the Supreme Court of the State of North Dakota is printed in the Appendix hereto.

OPINIONS BELOW

No opinion was given by the Supreme Court of the State of North Dakota in denying the petition for rehearing. The order is printed in the Appendix hereto, p. A-14 (Tr. 8546). The opinion of the Supreme Court of North Dakota, given prior to the petition for rehearing, is printed in the Appendix, hereto, p. A-1 (Tr. 8546) and the order is printed in the Appendix, hereto, p. A-12 (Tr. 8546).

JURISDICTION

The order of the Supreme Court of the State of North Dakota denying the petition for rehearing was entered on Nov. 3, 1969.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether the procedural protection of the "due process rights" of the Fourteenth Amendment to the Constitution of the United States of America are violated in allowing a special act (in the case at hand, providing for a board of education for the city of Fargo) by a Territorial Legislature (in the case at hand, Dakota Territory) to continue in force after a state (in the case at hand, North Dakota) is admitted to the Union and adopts a Constitution which prohibits special legislation in favor of the general laws of the State?

2. Whether there is a violation of the provisions of the Enabling Act (Chapter 180, U. S. Statutes at Large, 676 and approved February 22, 1889), "AN ACT to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments

and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states, "upon which said authorization North Dakota was subsequently admitted to the Union on the 2nd day of November, 1889, and which the general laws of North Dakota later came into being; which provided that when a city of the State incorporated under the general laws its school district also comes under the general laws?

3. Whether the Board of Education of the City of Fargo, a body corporate, is legally constituted in view of the general laws of North Dakota which have abolished special school districts for cities incorporating under the general laws?

4. Whether the allowing of a special school act to be in force for the City of Fargo discriminates against the petitioner and all other citizens of the City of Fargo in being deprived of the protection and equal rights of the general laws of the State of North Dakota and is a violation of the Fourteenth Amendment to the Constitution of the United States of America?

STATEMENT OF THE CASE

In April, 1963, the voters of the City of Fargo, North Dakota, approved by an 86 per cent majority the issuance of $2,150,000.00 in bonds for the building of a second high school in the city known as North High School and included $175,000 for remodeling of Fargo Central High School. The specific wording of the ballot did not spell out in detail what the funds were to be used for but was in general terms. However, the members of the Fargo Board of Education in numerous public statements said and led the public to believe the said funds would go toward remodeling Fargo Central High School.

Students of Fargo Central High School were excused from homework a night before the election to distribute campaign pamphlets urging a "yes" vote in favor of passage of the measure. The approval of the bond issue was the highest ever accorded any bond issue in the history of the city. The Fargo Board of Education later adopted a resolution commending the student body of Fargo Central High School for its support of the bond issue.

However, after the Board received the money, it spent all of the funds on the North High School including the $175,000 for Fargo Central High School. About five months after all the funds were spent, a fire ignited in the Fargo Central High School building burning the roof and third floor of the three-story building. The building was completely equipped with fire sprinklers.

Since the decree of the Supreme Court of North Dakota has come out, the fire chief of the City of Fargo has indicated in a newspaper article published in the official newspaper of the city, that arson may have been the cause of the Fargo Central High School fire. Some board of education members in a later news article were quoted as saying the Fire Chief's comments were the first they had heard of possible arson.

The Board of Education of the City of Fargo never did ask for an investigation into the matter of possible arson.

After the fire, the building was examined by structural engineers, who reported that the building was structurally sound. Accordingly, the Board of Education authorized cleaning up the building and placing of a permanent roof decking over the building with a temporary application of tar or roofing material, having an effective use of from five to eight years before needing another coating. About $37,000 was spent for this project. The Board of Education authorized classes in shop classes to be held in the

building after the fire and the swimming pool of the building was used. In the meantime, a second bond issue was approved under "emergency" conditions and together with about $689,000 insurance funds from the fire, a new South High School was constructed in the city. Designed for 1600 students, the new school had 1575 students enrolled the first year. The unanticipated increase in students led to another crisis in space in the city. Suggestions for using Fargo Central High School were made to the board and some 700 petitions were obtained urging that a cost survey be made of the building to bring the building up to 1969 standards, since the building had been found to be structurally sound. The board refused the request, however, and decided to place the property for sale. They agreed to sell the property to Cass County for a parking lot for the price of $75,000. The building was to be demolished.

An appraisal of the property made by the Board of Education indicated the building had an "insured value" of approximately $500,000. This did not include the foundation or structural items located beneath ground level such as the swimming pool. The value of the land was estimated at above $100,000.

The replacement cost of the building was estimated at more than $2,000,000. On Oct. 14, 1969, the Fargo Board of Education went before the voters of Fargo and requested $1,800,000.00 for placing an addition on the North High School and additions to two junior high schools in the city. This was defeated and failed to attain the necessary majority for bond issues in North Dakota.

The building space of the Fargo Central High School building is vitally needed to accommodate the senior high school population. Remodeling would result in tremendous savings as compared to replacement cost, according to the appraisal data on the building and its insurable value.

The Fargo Central High School building and land is located in the City of Fargo, County of Cass, State of North Dakota, and described as:

> Block Twenty-six (26) of the Original Townsite of the City of Fargo, Cass County, North Dakota

After the Board of Education was about to sell the building, the petitioner went into Court. The deceased attorney for the petitioner contended, with the approval of the petitioner, that the Board of Education could not sell the property. This is because the deed to the property says the land was "Sold to the City of Fargo for the use of schools" by an early owner of the land. The Court said that a "friendly" law case between Murray A. Baldwin, former mayor of Fargo, and the Fargo Board of Education, had previously decreed that the City of Fargo and the Board of Education were separate corporations and that, therefore, the city had nothing to do with the sale of the property of the board, notwithstanding, the language "Sold to the City of Fargo for the use of schools."

After the state Supreme Court order of September 18, 1969, the petitioner petitioned the North Dakota Court for a rehearing indicating that the Court had overlooked the law doing away with special school districts in North Dakota—such as that of Fargo.

Principles relating to Dakota Territory and the admission of North Dakota into the Union on the 2nd day of November, 1889, were first brought into the proceedings in the petition for a rehearing to the Supreme Court of the State of North Dakota.

This was deemed as the proper and timely place to bring these principles into the proceedings after earlier matters which were non-federal in question had been passed upon.

The Supreme Court of the State of North Dakota gave no opinion on the Dakota Territory issues raised in the petition for rehearing but issued an order denying the petition.

A. W. Stokes, the former attorney for the petitioner, died unexpectedly, shortly before the petition for rehearing was denied. Shortly after the order of the Supreme Court of the State of North Dakota denying the petition was issued, the Board of Education of the City of Fargo sold the Fargo Central High School building and land to Cass County.

On January 21, 1970, the Cass County Board of Commissioners opened bids for imminent destruction of the building. Bids were not awarded on Jan. 21, but delayed.

All of these proceedings were going on prior to the time for appeal to the United States Supreme Court by the petitioner had expired.

REASONS FOR GRANTING THE WRIT

(1) Petitioner is entitled to a reversal of the order denying a petition for rehearing by the lower Court, because said order is repugnant to prior decisions of this Court relating to the procedural protection of the "due-process rights" of the Fourteenth Amendment to the Constitution of the United States.

Among the cases relied upon by petitioner to sustain this view of the supremacy of the constitution and its procedural protection are:

Marbury v. Madison, 1 Cranch, 137-2 L. Ed. 60 (1803).

Chief Justice John Marshall delivering the opinion of this Court said:

"The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten,

the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained: The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

"Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people, to limit a power in its own nature illimitable."

(2) The special act providing for a board of education of the City of Fargo is in conflict with Article 1, Section 20 of the Constitution of the State of North Dakota.

The Constitution says:

"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens" (Article I, Sec. 20, North Dakota Constitution).

The special Fargo school act of 1885 granted special privileges to the City of Fargo that are given to no other

of the 435 public school districts in the State of North Dakota.

Every other school district in North Dakota, a total of 434, are operating under the general school laws of the state, except that of Fargo. The petitioner believes this is "class" legislation at its worse and gross discrimination of equal laws to all.

(3) Sec. 21 of Article I of the North Dakota Constitution says: "The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise."

(4) The allowing of a special school act to the City of Fargo is in conflict with **The Enabling Act** provisions for North Dakota to be admitted to the Union. An election was held on October 1, 1889 and the State Constitution was adopted by a vote of 27,441 yeas to 8,107 nays. On the basis of the approval of the Constitution, North Dakota was subsequently admitted to the Union.

(5) The Board of Education of the City of Fargo is not legally constituted under the general laws of North Dakota which provide when a city incorporates under the general laws, its school district comes under the general laws. The failure of the Fargo Board of Education to be under the general laws is a violation of the "due process rights" of the Fourteenth Amendment to the Constitution of the United States of America.

It is a fact that any **act** of a territory of the United States is subject to modification or abrogation by the United States Congress and any act of Congress is subject to action by the Supreme Court of the United States.

The petitioner believes that the 1885 Dakota Territory school act of the Fargo district is not legally in effect and hence, the present Board of Education of the City of

Fargo is not a legal body under the law and that, therefore, does not have legal authority to sell the Fargo Central High School building and land. The North Dakota state laws provide when districts formerly operating under territorial laws come under state laws, that a new board of education must be elected and the procedure for this process is outlined in the state laws. Since this procedure has not been followed it is maintained it would be in violation of the "due-process rights" of procedure.

In the case of Fargo, a special act of March 4, 1885, providing for a board of education of the city of Fargo is in violation of Sections 40-02-04 (p. 12) and 40-03-01 (pp. 17-19) of the current Laws of the State of North Dakota and also Sections 3552 (p. 855) and 3771 (p. 924) of the Compiled Laws of 1913 of North Dakota (Vol. 1) and therefore null and void, it is brought to the Court's attention.

The following so demonstrates:

(1) On the 15th day of January, 1875, the city of Fargo was duly incorporated by an act of the legislature of Dakota Territory entitled "An act to incorporate the city of Fargo," which act was duly accepted by said city; and thereafter and until the date hereinafter named, it continued, under such act, a municipal corporation.

(2) On the 4th day of March, 1885, the board of education of the city of Fargo was created by an act of the legislature of Dakota Territory entitled "An act to amend an act providing for a board of education for the city of Fargo, and regulating the management of the public schools therein."

(3) North Dakota was admitted to the Union on the 2nd day of November, 1889.

(4) On the 7th day of April, 1913, the qualified electors of the city of Fargo, at a special election duly called,

voted by a large majority of 1,300 in favor and 199 against for city organization and incorporation under the commission form of government under the general laws of the State of North Dakota. The vote was duly canvassed, the result duly announced and the city commission form of government was duly adopted and the city of Fargo incorporated under the general laws of the State of North Dakota to provide for the incorporation of cities. There was not at that time, however, nor at any time, a separate vote of the electors taken specifically adopting the provisions of Chapter 12 of the Laws of 1913 entitled "Education" but plaintiff contends that the vote and proceedings in the statutes set forth constituted such adoption.

This was the conclusion of the Supreme Court of South Dakota found in an identical case involving the city of Deadwood, S. D. **(State v. Power, 59 N. W. 1090 (1894))**. The facts are:

Deadwood incorporated under a special act of Dakota Territory and later an act providing a board of education for the city of Deadwood was created by the legislature of Dakota Territory on March 5, 1881.

The city of Deadwood, later incorporated under the general laws but its school district sought to continue under its special act for schools.

The Supreme Court of South Dakota ruled that a city incorporated under general laws also comes under the general school laws and any special act providing for a board of education for the specific city is repealed or abrogated.

The Supreme Court of South Dakota in its decision said:

> "When the city of Deadwood, therefore, by vote decided to incorporate or organize under the general law

and surrender its special charter, it took with its new organization all the incidents, rights and liabilities connected with such incorporation; and among these was the surrender of the special act creating its school board and its acceptance of the general school law. The citizens of that city must be presumed to have intended, by incorporation under the general city incorporation law, to have accepted all the incidents connected therewith."

The Supreme Court said further:

". . . we think the conclusion is irresistable that the legislature intended that a city, upon incorporation under the general act for the incorporation of cities should be governed thereafter by the general school law, and not by its special act."

The Supreme Court, in addition, said:

"But in the case at bar the legislature seems clearly to have intended that, in the event the organized city should choose to organize or incorporate under the general law, not only its special charter, but its special act organizing its school board, should also be abrogated, in order that its school system should be in harmony with its general system."

The principle between the incorporation of Fargo under the general laws of North Dakota in 1913 and the incorporation of Deadwood under the general laws, and the relationship of cities with special acts of cities that are involved in reorganization or reincorporation is identical, it is submitted.

The only variance in the cases between Deadwood and Fargo is that Deadwood incorporated in 1893, four years after South Dakota became a state, while Fargo waited until 1913 or 24 years after North Dakota became a state to incorporate under the general laws of North Dakota.

Nevertheless, the petitioner submits, that in spite of waiting for 24 years and in the meantime continuing under an old special school act of 1885, when the election of 1913 was held by the City of Fargo and the city was incorporated under the general laws, then the special act of Dakota Territory providing for a board of education was null and void, as such case was held by the Supreme Court of South Dakota which ruled against Deadwood and not allowing a city to be under general laws of the state and special acts of Dakota Territory at the same time.

Attention to special districts is found in Section 1229 (p. 297) of the North Dakota Compiled Laws of 1913 (Vol. I) and again in Section 3552 (p. 855) of the Laws of 1913 (Vol. I) and Section 3559, Page 857, of the Compiled Laws of 1913 (Vol. I) specifically says:

> "Whenever any city in this state shall organize under the chapter any special charter that may have been granted to such city **shall be null and void.**" (Emphasis ours.)

A special act or special charter from Dakota Territory means the same thing and therefore the special act entitled "An act to amend an act providing for a board of education for the city of Fargo, and regulating the management of the public schools therein," issued by Dakota Territory was null and void after April 7, 1913, being out of harmony with the city's adoption of the general laws of North Dakota and its incorporation.

Section 3560 (p. 857 of the Compiled Laws of 1913, Vol. I) urged the courts to take judicial notice of the change of cities under the chapter and the change of organization of a city, such as the case of the city of Fargo in 1913 incorporating under the general laws of the State of North Dakota, for the first time since North Dakota became a state in 1889.

Section 3560 of 1913 C. L. is today 41-01-03, N. D. C. C. An additional section urging the courts to take judicial notice of changes of organization or incorporation is found in Section 3775 (p. 925) of the Compiled Laws of 1913 (Vol. I) and is also Section 40-01-03 (page 5), N. D. C. C.

The only explanation that can be given for the perpetuation of the special act of Dakota Territory relating to the special act of the Fargo school district is that the principle of Fargo being under a special territorial act in violation of the general laws of the incorporation of cities of the State of North Dakota, has not until this day, been challenged in Federal court.

The uniqueness of allowing only the city of Fargo to operate under an old special act which originated in Dakota Territory days must certainly come under suspicion when years ago, innumerable cities in both sections of Dakota Territory had identical and similar laws. The only conclusion can be that Fargo has, in violation of the general laws relating to the incorporation of cities in the state in 1913, continued under an old special act of Dakota Territory days because the conflicts between the act and the general laws have only until today been challenged before Federal court.

It is submitted there can be no quarrel with the interpretation of this law as ruled by the Supreme Court of South Dakota in the case of **State v. Power** (Supra) that the general laws of the state, when a city incorporates, are supreme. And from that time, when a city incorporates under the general laws of a state, any special acts originating from Dakota Territory days are repealed or abrogated.

With the city of Fargo currently operating under the general laws of the State of North Dakota, the appellant submits that any special acts relating to the city of Fargo

and providing for a board of education for the city of Fargo are in conflict with the general laws and the Constitution of the State of North Dakota which, in turn was admitted into the Union on the basis of its approval by the vote of the people on October 1, 1889.

CONCLUSION

The order of the Supreme Court of the State of North Dakota in denying a petition for rehearing to the petitioner in pursuance of his right of the procedures of "due process rights" concerning the standing of the Fargo school law act of 1885 of Dakota Territory in view of the subsequent admission of North Dakota into the Union and matters of federal interest is repugnant to the law of the land as laid down by this Honorable Court in its prior decisions.

The denial for a petition for a rehearing and the standing of the 1885 Dakota Territory act which the Board of Education of the City of Fargo is now operating on should be reviewed by this Court.

Wherefore, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of North Dakota, to the end that this cause for a rehearing may be reviewed and determined by this Court; that the order of the said Supreme Court of the State of North Dakota be reversed by this Court; and that he may be granted such other and further relief as to this Court may seem meet and proper.

Respectfully submitted

RICHARD BLAIR
Grand Forks Herald
114 North Fourth Street
Grand Forks, North Dakota 58201

APPENDIX A

In the Supreme Court
State of North Dakota

September 18, 1969

Richard Blair,
Plaintiff and Appellant,

v.

The City of Fargo, a Municipal Corporation, and Board of Education of the City of Fargo, a Body Corporate,
Defendants and Respondents.

Civil No. 8546.

1. Although under the law the City of Fargo and the Board of Education of Fargo supervise the same area and the same population, the laws creating them made them wholly separate and distinct public corporations, independent of each other, each performing different functions, discharging different duties, and exercising different powers.

2. Where the law creating the Board of Education of the City of Fargo provides that title to school property shall be vested in the City of Fargo, and further authorizes the Board of Education to purchase, sell, exchange, and lease schoolhouses, lots, or sites for school purposes, and gives to such school board the power to build, purchase, lease, enlarge, alter, improve, and repair schoolhouses; and where, over the years, the member of the Board of Education and the officials of the City of Fargo have interpreted this statute as giving to the Board of Education the authority to sell school property; and where the courts of this State have construed such statute as giving to the Board of Education the authority and power

to sell school property, and such construction is supported by long acquiescence on the part of the Legislative Assembly and failure of the Assembly to amend the law—it will be presumed that such interpretation of the statute is in accordance with legislative intent.

3. So long as the Board of Education acts within the authority conferred upon it by law, courts will not interfere with or review decisions of the Board which involve the exercise of discretion, in the absence of a clear abuse thereof. The wisdom of the action of the Board is not open to judicial review if the Board had the power to act as it did.

4. For reasons stated in this opinion, the judgment of the district court is affirmed.

(Syllabus by the Court)

Appeal from the District Court of Cass County, the Honorable Harold M. Hager, Judge.

Affirmed.

Opinion of the Court by Strutz, J., on reassignment.

Stokes, Vaaler, Gillig, Warcup & Woutat, Grand Forks, for plaintiff and appellant.

Tenneson, Serkland, Lundberg & Erickson, Fargo, for respondent Board of Education of the City of Fargo.

Garylle B. Stewart, Assistant City Attorney, Fargo, for respondent The City of Fargo.

Blair v. City of Fargo

Strutz, J., on reassignment.

In 1963, the electors of the Fargo School District, which embraces the same area as the City of Fargo, approved a

bond issue for $2,150,000 for the purpose of erecting, enlarging, improving, and acquiring sites for furnishing and equipping high school facilities in the District. Prior to the election, a citizens committee had issued and circulated a publicity pamphlet which urged the people to approve the bond issue, and stated that, if approved, $175,000 of the moneys realized from such bond issue would be used for modernizing and enlarging the library and cafeteria and providing additional classroom space and science laboratories at Fargo Central High School, which at the time was the only high school in the district. The balance of the moneys from such bond issue was to be used for building a new high school on the north side of the city. The ballot which was submitted to the voters, however, did not specify that any part of the moneys would be used to remodel Central High School.

The bond issue was approved by the voters of the district. However, the suggested remodeling of Central High School never was done, and the entire amount raised by the issue was used in the construction of a new high school in the district known as North High School.

After North High School had been built, it became apparent that Central High was very inadequate in many ways, and the deficiencies in the building and its location became a matter of serious concern to the Board of Education. The building itself had many deficiencies which made it undesirable for continued use as a high school. The library, the science facilities, the cafeteria, the gymnasium, and the auditorium all required improvements and remodeling if they were to be continued in use. The area in which the school was located had become largely a commercial area, and the school population in the immediate area was dwindling. Furthermore, there was a complete lack of parking facilities available for use of persons teaching in or attending the school.

For the above reasons, the Board of Education hired Dr. Paul W. Seagers of the University of Indiana, an expert on school construction, to examine not only Central High School but the entire Fargo school system for the purpose of making recommendations, particularly as to what should be done with the facilities at Central High. He arrived in Fargo at about the time that a fire partially destroyed Central High. Following his examination and investigation of the entire Fargo school system, this expert recommended that the building which housed Central High not be repaired and restored, but that it be abandoned and that a new structure be built to replace it at some location in the south part of the city. He stated that his recommendations would have been the same even if no fire had occurred in Central High.

In February of 1966, which was prior to the fire, the Fargo Board of Education had secured an estimate for the remodeling of the Central High building. This estimate was in the sum of $359,625. With certain proposed additions and changes which the Board had considered, the estimate for such remodeling was between $400,000 and $500,000. However, even the highest figure made no provision for adequate parking at the school.

Thereafter, a bond issue for the construction of a new high school facility, to be located in the south part of the city, was submitted to the voters of the school district. This bond issue was in the amount of $3,200,000. The bond issue was approved by the voters.

On April 19, 1966, subsequent to the securing of the bids above mentioned, a fire partially destroyed Central High. Thereafter, the school board secured estimates of the cost to replace the facility in the same structural condition as before the fire, and it received an estimate of $860,396.10. This estimate, however, did not include the cost of any equipment nor did it provide for any remodeling or al-

teration of the physical structure, which the Board had deemed advisable and necessary. It merely provided for a restoration of the building to its former condition.

Central High School is located immediately across the street from the Cass County Courthouse. After the approval of the bond issue for the construction of South High, the Board of Education entered into an agreement, after calling for bids, to sell the old Central High building and grounds to Cass County, which had submitted the high bid.

The plaintiff thereupon commenced this action as a citizen and taxpayer, for himself and for all other similarly situated, seeking to enjoin the sale of Central High to the County. The plaintiff contends that the property upon which Central High is situated was conveyed to the City of Fargo specifically for school purposes, and that it therefore may not legally be sold for any other purpose. The district court denied the injunction and dismissed plaintiff's complaint, and plaintiff appeals to this court from the judgment entered.

Plaintiff raises three issues on this appeal:

1. The only body that has the legal right to sell the property in question is the City of Fargo.

2. The Fargo School Board is without authority to sell the property in question.

3. Even if the Fargo School Board might have the power to sell, the sale it is contemplating is an abuse of such power.

It will be noted that the three issues raised by the plaintiff are very closely related. If the only body that has the legal right to sell the property in question is the City of Fargo, then obviously the Board of Education of the City of Fargo is without authority to sell it. If we

determine that the School Board does have the power to sell, then we must determine whether the action of the Board in this case constituted an abuse of its power.

The defendant Board of Education of the City of Fargo was created by an Act of the Legislative Assembly of the Territory of Dakota, approved March 4, 1885. Council Bill 117, now embodied in Chapter 15-51, N. D. C. C. The Act creating the Board of Education of the City of Fargo provided:

> "The board of education shall be a body corporate in relation to all the powers and duties conferred upon them by this act, to be styled 'The Board of Education of the City of Fargo' and as such shall have power to sue and be sued, to contract and be contracted with, and shall possess all the powers usual and incident to bodies corporate as shall be herein given, and shall procure and use a common seal. A majority of the members of said board shall constitute a quorum for the transaction of business." Sec. 15-51-07, N. D. C. C.

The Act further provided that the Board should have the power, among other things, to purchase, exchange, lease, or improve sites for schoolhouses; to build, purchase, lease, enlarge, alter, improve, and repair schoolhouses; and to procure, exchange, improve, and repair school apparatus, furniture, and appendages. Sec. 15-51-11, N. D. C. C.

General powers of the Board are found in Section 15-51-17, North Dakota Century Code.

There are other provisions, all of which clearly indicate that it was the intent of the Legislative Assembly to give to the Board of Education powers separate and distinct from those of the City of Fargo.

The provisions of the law as originally enacted have been continued as the law of this State without substantial change since 1885, when the Act was first enacted. This law has been construed since its enactment by officials of the City, by members of the Board of Education, and by the courts as creating a public corporation which is wholly separate and distinct from the City of Fargo. In the present case, the City of Fargo has appeared and disclaimed any right to exercise any control over the school property designated as Central High School. The record further discloses that over the years the Board of Education has sold, exchanged, and purchased property for school purposes, under the authority given it by this Act, without consulting the City of Fargo or its officials.

The plaintiff, however, contends that since the title to the property in question is held in the name of the City of Fargo, only the City may sell it, unless it is sold for school purposes. The plaintiff asserts that the specific authority given the Board is "To purchase, sell, exchange and lease houses or rooms for school purposes, lots or sites for schoolhouses, and to fence and improve them as they may deem proper; . . ." Sec. 15-51-17(2) N. D. C. C.

Thus, the plaintiff asserts, the Board's power is limited to purchasing, selling, exchanging, or leasing houses or rooms for school purposes and lots or sites for schoolhouses; that the authority is not sufficiently broad to permit the sale of school lots or sites for any purpose other than for school purposes. Here, the proposed sale is to the County of Cass for use of the County, and therefore, asserts the plaintiff, such proposed sale is invalid since the site will not be used for school purposes.

We believe that the interpretation of the law contended for by the plaintiff is unreasonable since, under his theory, the Board of Education could not dispose of property once used for school purposes which has deteriorated to the

extent that its continued use would be impractical and undesirable. The Board would have no power, if plaintiff's contentions are correct, to exchange such property at any time for other property more suitable for school purposes.

The authority of the Board of Education as conferred upon it by this law has been construed in several cases by this court. In **Anderson v. City of Fargo**, 48 N. D. 722, 186 N. W. 378, decided in 1922, this court pointed out that while the title to all school property in the city of Fargo vested in the City under the provisions of the Act enacted by the Territorial Legislative Assembly, the same law provided for a Board of Education for the conducting of the business of the schools. This law gave to the Board of Education exclusive control over all schools and also the right to purchase, sell, exchange, and lease houses for school purposes and lots and sites for schoolhouses.

In a later decision, **Baldwin v. Board of Education of City of Fargo**, 76 N. D. 51, 33 N. W. 2d 473, decided in 1948, this court again held that although title to school property was vested in the City of Fargo for the use of schools by the Special Act of the Territorial Legislature of 1885, it was the intention of the Legislature to make the Board of Education a wholly separate and distinct public corporation, separate from the municipal corporation known as the City of Fargo. In **Baldwin**, we said:

> "The city of Fargo and the defendant, the Board of Education of the City of Fargo, comprise the same area and the same population, but they are corporate bodies, independent of each other, each performing different functions, discharging different duties, and exercising different powers. The defendant, the Board of Education of the City of Fargo, administers the public schools, provides and controls all properties utilized in the operation, . . . The city of Fargo has

nothing to do with these activities and can exercise no control over them."

If the Board of Education controls and administers the public schools and all properties utilized in the operation of the school district, and if the City of Fargo has nothing to do with these activities, the Board of Education must be held to have the power to sell the property in question.

As pointed out earlier in this opinion, the defendant Board of Education over the years has sold, exchanged, and purchased property under the authorization given to it by Chapter 15-51, North Dakota Century Code. This was done without consulting the city officials of the City of Fargo, and with their apparent approval. The plaintiff's contention that the property in question is owned by the City of Fargo and that the City alone has the power to sell it, cannot be sustained.

For years, the officials of the City of Fargo and of the Board of Education have interpreted this statute as giving to the Board of Education the authority to sell school property. If, as the plaintiff asserts, this statute does not clearly give to the Board of Education the power to sell property which the Board in its discretion decides is no longer needed for school purposes, the long-time interpretation of this statute by the officials of the City and of the Board of Education becomes significant. This Court has held that if an Act of the Legislature is not clear, the courts will give weight to practical and contemporaneous construction placed upon such Act by officers charged with its administration. **Walker v. Weilenman**, 143 N. W. 2d 689 (N. D. 1966).

Furthermore, the decisions of this court in **Anderson** and in **Baldwin**, *supra*, are a complete answer to the plaintiff's contention that this property, held in the name of the City of Fargo, may be transferred only by the

City of Fargo. The construction of a statute by the courts, supported by long acquiescence on the part of the Legislative Assembly, or by the continued use of the same language, or by failure of the Legislative Assembly to amend the law, is evidence that such construction is in accordance with the legislative intent. **Portland Credit Union v. Hauge**, ... N. W. 2d ... (N. D. 1969); **Kline v. Landeis**, 147 N. W. 2d 897, 902 (N. D. 1967).

We hold, therefore, that under the provisions of Chapter 15-51, North Dakota Century Code, the defendant Board of Education of the City of Fargo has the right to purchase, sell, exchange, and lease buildings, lots, or sites for school purposes; that if in the discretion of the members of the Board of Education a different site is more desirable and more adequately meets the needs of the District than the one occupied by Central High School, whether because its location has become a business district or because of the complete lack of parking facilities at the present location, or because of the outmoded condition of the present building, then the members of the Board of Education have the power, under the provisions of the statute cited, to sell the present building and establish high school facilities at a more suitable location.

The plaintiff asserts that the contemplated sale to the County of Cass by the Board of Education is, in any event, an abuse of the discretion vested in the Board of Education by law. If the Board of Education has the legal authority to sell the building, as we hold it has, courts will not attempt to tell the Board how to exercise its authority. The authority to administer school affairs has been vested by the Legislature in the Board of Education. That gives to the Board certain discretion. Courts have no power to place their judgment or discretion over that of the Board. We would point out that the Board called for bids in selling the old Central High School property, which property, in the opinion of the Board,

had become impractical for school purposes, making it unrealistic to repair, remodel, and use the facility for a school. The bid of Cass County was the highest bid received for the property. Thereafter, the Board, in the exercise of its discretion, determined that the bid of the County should be accepted and the property be sold to it.

Courts are slow to interfere with acts of a public body where such acts involve the exercise of discretion. Here, the Legislature has vested the Board of Education with authority to dispose of property if, in its discretion, that should be done. Courts are without power to interfere and will not interfere with the action of such a board in the absence of a clear abuse of discretion or authority by the board. The wisdom or expediency of the action taken by the board is not open to judicial review. 78 C. J. S., **Schools and School Districts**, Sec. 128, p. 920 *et seq.*

As we held in the comparatively recent case of **Herman v. Medicine Lodge School District No. 8 (McHenry County)**, 71 N. W. 2d 323 (N. D. 1955), as a general rule, the courts will not interfere with the discretion of school boards in the performance of their duties, except to prevent an abuse of that discretion.

For reasons stated in this opinion, the judgment of the district court is affirmed.

Alvin C. Strutz
Ralph J. Erickstad
Wm. L. Paulson
Harvey B. Knudson
Obert C. Teigen, C. J.

APPENDIX B

File No. 8546

State of North Dakota,
In the Supreme Court, } ss.

Appeal from the District Court of Cass County.

Richard Blair,
Plaintiff and Appellant,

v.

The City of Fargo, a Municipal Corporation, and
Board of Education of the City of Fargo, a Body Corporate,
Defendants and Respondents.

This action coming on to be heard at the June A. D. 1969 term of this Court at the Supreme Court rooms in the City of Bismarck, State of North Dakota:

Present: Honorable Obert C. Teigen, Chief Justice; Honorable Alvin C. Strutz, Honorable Ralph J. Erickstad, Honorable Harvey B. Knudson, Honorable Wm. L. Paulson, Associate Justices; and the appeal herein having been argued by Mr. A. W. Stokes for the Appellant and argued by Messrs. Tenneson and Stewart for Respondent and the court having been advised thereon it is now considered, ordered and adjudged that the judgment of the said District Court within and for said Cass County appealed from herein, be and the same Is hereby Affirmed.

And It Is Further Ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this court.

And It Is Further Considered and Adjudged, That Respondents have and recover of the Appellant costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated September 18 1969.

By the Court,

Attest: Luella Dunn
Clerk

Obert C. Teigen
Chief Justice

Seal
North Dakota
Supreme Court

APPENDIX C

File No. 8546

IN THE SUPREME COURT
State of North Dakota

Order on Petition for Rehearing

Filed in Court this 3rd day of November, 1969.

Luella Dunn
Clerk

Remittitur sent down 6th day of November, 1969.

Appeal from the District Court of Cass County.

Richard Blair,
Plaintiff and Appellant,

v.

The City of Fargo, a Municipal Corporation, and
Board of Education of the City of Fargo, a Body Corporate,
Defendants and Respondents.

This action coming on to be heard at the June A. D. 1969 term of this Court at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present: Honorable Obert C. Teigen, Chief Justice; Honorable Alvin C. Strutz, Honorable Ralph J. Erickstad, Honorable Harvey B. Knudson, Honorable Wm. L. Paulson, Associate Justices;

and a petition for a rehearing upon the appeal herein having been filed by Mr. A. W. Stokes for the appellant

and the court having advised thereon, it is now here considered, ordered and adjudged, that the petition be and the same is hereby denied.

And It Is Further Ordered, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this court.

Dated November 3, 1969.

By the Court

Obert C. Teigen
Chief Justice

Attest:
Luella Dunn

State of North Dakota } ss.
In the Supreme Court }

The petition for a rehearing upon the appeal in the above entitled action is hereby Denied.

Alvin C. Strutz
Ralph J. Erickstad
Wm. L. Paulson
Harvey B. Knudson
Obert C. Teigen
Judges Supreme Court
State of North Dakota

State of North Dakota } ss.
In the Supreme Court }

I, Luella Dunn, Clerk of the Supreme Court within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true and correct copy of the Order denying the Petition for Rehearing in the

case of Blair v. City of Fargo, our file No. 8546, as the same remains of record in my said office.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court at Bismarck, this 26th day of January, 1970.

Luella Dunn
Clerk, Supreme Court